IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

ELAINE M. R.,

Plaintiff,

v. Civil Action No. 6:20-cv-0759 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

APPEARANCES: OF COUNSEL:

FOR PLAINTIFF

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VICTORIA H. COLLINS, ESQ.

FOR DEFENDANT

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JESSICA RICHARDS, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the

Commissioner of Social Security ("Commissioner"), pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.[1] Oral argument was conducted in connection with those motions on November 4, 2021, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

ORDERED, as follows:

1) Plaintiff's motion for judgment on the pleadings is GRANTED.

2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the

[1] This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

Social Security Act, is VACATED.

3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.

4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

David E. Peebles
U.S. Magistrate Judge

Dated: November 9, 2021
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
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ELAINE MARIE R.,

Plaintiff,

vs. 6:20-CV-759

COMMISSIONER OF SOCIAL SECURITY,

Defendant.
----------x

Transcript of a **Decision** held during a Telephone Conference on November 4, 2021, the HONORABLE DAVID E. PEEBLES, United States Magistrate Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

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(The Court and all counsel present by telephone.)

THE COURT: I appreciate your excellent presentations in writing and your excellent succinct presentations here during the hearing.

I have before me an application by the plaintiff to vacate a determination by the Acting Commissioner of Social Security pursuant to 42 United States Code Sections 405(g) and 1383(c)(3).

The background is as follows: Plaintiff was born in June of 1987, she is currently 34 years old. She was 29 years of age at the alleged onset of disability on December -- I'm sorry, January 12, 2007. Plaintiff lives in Croghan, New York with her parents and brother. She is single. Plaintiff stands 5 foot, 8 inches in height and weighed at various times between 250 and 261 pounds. Plaintiff has a college degree and has undertaken some graduate coursework. Plaintiff does not have any work that has been considered as substantial gainful activity, or SGA. There is a little discrepancy, or let's say the record is equivocal as to when she stopped working. At 223 she states she stopped working on May 20, 2011. There is reference over on page 31 to working at Walmart for six months, between the end of 2012 and 2013 I believe. That is not listed on her work history, 14E, or on her functional report, 2E. In any

event, plaintiff's past work has included as a cashier, a child care provider, a lifeguard, a maintenance tour guide -- maintenance worker, and a college tour guide.

Physically, plaintiff suffers from clostridium difficile colitis, or C.diff, which was diagnosed on March 30, 2007. She has been treated for a traumatic brain injury. She is obese. She has suffered a brachial plexus avulsion of the left upper extremity, status post repair. My understanding is that the brachial plexus is a group of nerves located in the armpit area, and that an avulsion occurs when the nerves are either completely torn or damaged or stressed. She also has had ventriculoperitoneal shunting, which is basically placement of a tube or catheter from a cavity in the head to the abdomen to drain excess cerebral spinal fluid.

Plaintiff was involved in a motor vehicle accident on January 12, 2007 causing apparent severe injuries. She was hospitalized from December 12, 2007 to March 9, 2007. The discharge summary is at 400 to 405 of the administrative transcript, wherein at that time she underwent several surgeries that are listed at page 400. She also followed that hospitalization with rehabilitation at Sunnyview Rehabilitation Hospital.

Mentally, plaintiff claims to suffer from depression and anxiety. She, however, is not undergoing any

current treatment or medication for those conditions.

Plaintiff has had several providers over time including, at Upstate, Dr. Gregory Canute and several other providers. She has seen Licensed Clinical Social Worker Philip McDowell seven times, all during 2011. She has seen Dr. Lee Vance, a psychologist, and from beginning October of 2017, she is currently or has been in the past prescribed gabapentin, Lyrica, Percocet, Vicodin, and Alinia for her C.diff.

In terms of activities of daily living, plaintiff was able to cook, vacuum, and do other light chores. She does some personal care, she showers, dresses, reads, she can walk one mile. She has difficulty with dishes but can do them, she has trouble with buttons and tying her shoes. Plaintiff uses alcohol and marijuana. The record is equivocal as to the frequency of marijuana use.

Procedurally, plaintiff applied for Title XVI Supplemental Security Income payments on June 23, 2017, alleging an onset date of January 12, 2007. That coincides with the date of her motor vehicle accident. She claims disability based on traumatic brain injury, brachial plexus avulsion, C.diff, a VP shunt, loss of sense of smell, and insomnia.

A hearing was conducted on July 8, 2019 by Administrative Law Judge Timothy G. Stueve to address that

application. On July 25, 2019, ALJ Stueve issued an unfavorable decision which became a final determination of the agency on June 5, 2020 when the Social Security Administration Appeals Council denied plaintiff's application for review. This action was commenced on July 8, 2020 and is timely.

In his decision, the ALJ applied the familiar five-step test for determining disability.

At step one, he concluded that plaintiff had not engaged in substantial gainful activity since May 25, 2017.

At step two, he concluded that plaintiff suffers from severe impairments that provide more than minimal limitation on her ability to perform basic work activities including obesity, brachial plexus avulsion of left upper extremity status post repair. In arriving at that conclusion, he rejected C.diff, alcohol abuse, and mental impairments as severe at step two.

At step three, he concluded that plaintiff's conditions do not meet or medically equal any of the listed presumptively disabling impairments set forth in the regulations, specifically considering Listings 1.02 and 11.14.

The ALJ next concluded that plaintiff retains the residual functional capacity, or RFC, to perform light work with additional physical limitations. There are no mental

limitations set forth in the residual functional capacity.

At step four, the ALJ noted plaintiff does not have any past relevant work to consider and proceeded to step five.

At step five, he found that if plaintiff were capable of performing a full range of light work, a finding of no disability would be directed by the Medical-Vocational Guidelines, or Grids, set forth in the Commissioner's regulations, specifically citing Grid Rule 202.20. Because of the additional limitations that restricted or limited the job base on which the grids are predicated, he sought the testimony of a vocational expert and, based on that testimony, concluded that plaintiff is capable of performing available work in the national economy and cited as representative positions bus monitor, counter clerk, and shipping weigher.

The court's task of course in this case is to determine whether correct legal principles were applied and the resulting determination is supported by substantial evidence. It is undeniably a very deferential standard, probably more strict, at least the Second Circuit has noted, than the clearly erroneous standard.

Plaintiff raises several contentions in this case. She challenges the step two finding that plaintiff's mental impairments and C.diff are not sufficiently severe to meet

the modest test at step two. She also argues that the RFC finding is not supported by substantial evidence, citing the lift and carry -- the lift-and-carry component, rejection of vocational rehab evaluation, and the finding of no mental limitations.

And at three, point three, she argues that there is a conflict that was unresolved between testimony of the vocational expert and the Dictionary of Occupational Titles that was unresolved and therefore argues a violation of Social Security Ruling 00-4p.

Of course the overarching consideration is that it is plaintiff's burden to establish disability up through step four, the burden of course then shifts at step five to the Commissioner.

As to the first argument -- before I get to that, I found one issue that I wanted to raise. There is a consultative opinion report of an internal medicine examination by Dr. Elke Lorensen in the record. It appears at 606 to 610 of the record. It includes a medical source statement that finds marked limitations in certain areas. The opinion is not referenced in the decision. Because the date of filing of plaintiff's application in this case is governed by the new regulations under 20 C.F.R. Section 416.920(c), medical opinions, of which this is one, must be considered using the factors cited in the Regulation. The

fact that it is not cited in the ALJ's decision could provide a basis for remand under *Kentile v. Colvin*, 2014 WL 3534905 from the Northern District of New York, July 17, 2014, *Saxon v. Astrue*, 781 F.Supp.2d 92 from the Northern District of New York, 2011, and *Javon W. v. Commissioner of Social Security*, 2019 WL 1208140, also from the Northern District of New York.

However, because the argument was not raised, I find that it is waived. In addition, I also find that if there was error, and there was error, it is harmless because for the most part Dr. Lorensen's medical source statement is consistent with the residual functional capacity finding.

The second, or one of the arguments raised is the step two argument. The ALJ rejected C.diff at step two, that's at page 12, citing no recent medical treatment. I find no error in that regard. Dr. Stillman reported on July 17, 2007 at page 657 that plaintiff's C.diff infection was gone, and I didn't see anything to indicate that it persisted to a level that it would interfere with plaintiff's ability to perform basic work functions. So I find that substantial evidence supports that rejection.

The next argument raised is, relates to the vocational expert's testimony. Clearly the Commissioner has the burden at step five. That burden can be met by relying on the testimony of a vocational expert presented with a

hypothetical that mirrors the residual functional capacity finding. In this case, the RFC finding specifically provided for no reaching, handling, or fingering with the left upper extremity.

As I indicated during the argument, the DOT speaks to reaching, handling, and fingering, as does the SCO for each of these positions. School bus monitor, the DOT, and specifically DOT 372.667-042 provides that reaching, handling, and fingering are not present in that position. The DOT for counter clerk, 249.366-010, requires occasional reaching, occasional handling, and occasional fingering. The DOT for shipping and receiving weigher, 222.387-074, requires occasional reaching, frequent handling, and occasional fingering. The DOT clearly does not contemplate a limitation on just one extremity performing those functions.

The SSR 00-4p provides that when there is a conflict between the testimony of a vocational expert and the DOT, there is a duty on the part of the ALJ to resolve the issue. At page 53 and 54 of the administrative transcript, the ALJ asks if the vocational expert's testimony is consistent with the DOT. The vocational expert specifically answered that it is, but it was supplemented with regard to the reaching limitation with one hand, through his experience. The DOT of course, as I indicated, does not address unilateral reaching limitations. I find no conflict.

If there was a conflict, however, I find the error is harmless. The bus monitor position, as I indicated, does not require any reaching, handling, or fingering, the VE testified that there are 18,000 available jobs in that category, and that is sufficient to carry the Commissioner's burden. I find no error at step five.

The problem I have in this case comes with the step two determination of the mental component. The step two determination is, the test is extremely minimal. To be severe for step two purposes, an impairment has to significantly limit a claimant's physical or mental ability to do basic work activities. The test is de minimus and intended only to screen out the truly weakest of cases. *Dixon v. Shalala*, 54 F.3d 1019 at 1030, Second Circuit 1995. By the same token, the mere presence of a disease or impairment or mere diagnosis is not sufficient to establish a condition as severe.

Now in this case, we are dealing with a mental impairment. The regulations provide for evaluation of a mental impairment. In 20 C.F.R. Section 416.920a(c), it is well established that that requires consideration of plaintiff's functioning in four functional domains or areas that include the understanding, remembering, and applying information; interacting with others; concentrating, persisting, or maintaining pace; and adapting or managing

oneself. The administrative law judge did consider, he states, those four domains. He, at page 13 of the administrative transcript, in written summary form, recites some of the significant evidence that he believes bears on these functional areas, and then concludes that the medically determinable mental impairments cause no more than mild limitation in any of the functional areas. He does not, however, as most ALJs do, break them out and discuss them specifically individually, and the one that I have the most problem with is interacting with others. I didn't see anything in the discussion that allows me to understand the administrative law judge's reasoning in concluding that there is no more than a mild limitation in this area. I note that the plaintiff testified to outbursts with coworkers at page 34; she testified at page 36 to trouble getting along with family and friends; and at 46 to 47, not accepting criticism well. I believe it was error for the administrative law judge not to lay out his reasoning so that the court could understand it and determine whether it is supported by substantial evidence, so I do find error at this step two determination.

Historically, an error at step two is harmless if the administrative law judge goes on to the remaining steps of the sequential analysis. However, in this case, I can't find that it's harmless because there are no limitations in

the RFC speaking to plaintiff's mental condition. I do find error. I don't find there is persuasive evidence of disability, however. I will order that the determination be vacated and the matter remanded for further consideration consistent with this opinion.

Thank you both for excellent presentations, I hope you have a good afternoon.

MS. COLLINS: Thank you, your Honor.

MS. RICHARDS: Thank you.

(Proceedings Adjourned, 3:27 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, DO HEREBY CERTIFY that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 5th day of November, 2021.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter